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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No.87-154

COMMENTS OF THE GOLDMAN SACHS GROUP, L.P.

THE GOLDMAN SACHS GROUP, L.P.

Patricia Diaz Dennis, Esq.
Sullivan & Cromwell
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 956-7500
Attorneys for The Goldman
Sachs Group, L.P.

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SUMMARY

The Goldman Sachs Group, L.P. provides investment banking services to media companies. The Goldman Sachs Group, L.P. also sometimes makes passive equity investments in media businesses by acquiring an insulated limited partnership interest. Because the FCC's limited partnership attribution insulation criteria are vague, The Goldman Sachs Group, L.P. is hampered in providing capital to media businesses because it does not want to risk violating media ownership restrictions. The Commission should clarify that, under its limited partnership insulation criteria, a limited partner may perform investment banking services for its media limited partnership and remain insulated from ownership attribution. Otherwise, media companies, especially new entrants, including women and minorities, could lose investment banking firms as a source of capital and financing services.

The FCC should maintain its policy of treating nonvoting stock as nonattributable for purposes of applying its ownership rules. Those who advocate changing this policy bear the burden of proof. On the other hand, the Commission should eliminate its cross-interest policy for nonattributable equity interests, because it is uncertain and has outlived its usefulness.

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COMMENTS OF THE GOLDMAN SACHS GROUP, L.P.

The Goldman Sachs Group, L.P. urges the Federal Communications Commission ("FCC" or "Commission") to clarify the attribution insulation criterion regarding the services a limited partner may perform for a media limited partnership. The Goldman Sachs Group, L.P. also asks the FCC to continue to treat nonvoting stock interests as nonattributable and to eliminate the ill-defined (and undefinable) cross-interest policy for nonattributable equity investments.

BACKGROUND

The Goldman Sachs Group, L.P. and its subsidiaries ("Goldman Sachs") are a leading international investment banking organization. Goldman Sachs provides clients engaged in media industries with investment banking services, including:

1. arranging financings by underwriting and distributing debt and equity securities in public offerings and by placing such securities in private placements in U.S. and non-U.S. capital markets*; and
2. acting as a financial advisor in mergers, acquisitions, divestitures and restructurings.

The financial advisory services are transaction-specific and consist of, for example, advising on the structuring, timing and pricing of a securities offering or placement; providing financial and business analyses of a proposed acquisition and providing advice regarding whether

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* Generally, an "underwriting" involves the purchase of debt or equity securities from an issuer by an investment banking firm, or syndicate of firms, and the resale of the securities to the public. A "private placement" transaction is generally a direct sale of securities from the issuer to institutional and other sophisticated investors arranged by the investment bank acting on the issuer's behalf. The investment bank, however, may also underwrite a private placement by purchasing the securities from the issuer and reselling them to investors. Goldman Sachs may, from time to time, facilitate major client transactions by either purchasing, or making commitments to purchase, equity or debt securities in merger, acquisition, restructuring and leveraged capital transactions. In connection with these financings, Goldman Sachs representatives participate in customary due diligence review of the issuer's business and financial prospects.

the proposed acquisition of a particular company is a sound financial decision; developing strategies to take account of financial market conditions, interest rates, and economic and political conditions; and analyzing alternative financial strategies.

Goldman Sachs sometimes makes passive equity investments in media businesses by acquiring insulated limited partnership or nonvoting stock interests. Goldman Sachs does not control and is not active in the businesses' day-to-day operations, management, or programming decisions. Because the FCC limited partner attribution insulation criteria and cross-interest policy are vague, Goldman Sachs and other investment banks are hampered in providing capital to media businesses, because they do not want to risk violating media ownership restrictions.

ATTRIBUTABLE INTERESTS

Purpose of the FCC's Ownership Rules

The purpose of the Commission's media multiple ownership rules is "to foster programming diversity by encouraging diversity of ownership, and to assure competition in the provision of broadcast services." In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rule Making, MM

Dockets Nos. 94-150, 92-51, and 87-154, FCC 94-324 (released January 12, 1995) ¶ 1 ("Broadcast Attribution NPRM") To implement the ownership rules, the FCC developed its attribution rules.

Through the attribution rules, the Commission identifies holders of interests in media properties who could affect programming content or competition. As stated in KKR Associates, L.P., 2 F.C.C.R. 7104 (1987):

> [W]e did not seek to make attributable all interests no matter how remote or insignificant. Instead, we sought to identify only those positions or ownership interests that carried with them a sufficient degree of influence to affect, at least potentially, the management and operation of licensed facilities in a manner that might lessen programming diversity or increase the risk of undue economic power.

Id. at 7105 (emphasis added).

Investment Banking Services Do Not Materially Relate to Media Activities

For media businesses formed as limited partnerships, the Commission currently exempts from attribution the partnership's limited partners who are sufficiently insulated from material involvement "directly or indirectly, in the management or operation of the media-related activities of the partnership . . . ." 47 C.F.R. § 73.3555 n. 2(g)(1)(1994).

To insulate limited partners from attribution under the "material involvement" standard, under present FCC rules, a limited partnership agreement must contain, and limited partners must adhere to, seven specified insulation criteria. Of chief concern to Goldman Sachs is the sixth criterion providing that a "limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business." Broadcast Attribution NPRM n. 110.

In explaining and applying this criterion, the Commission has not yet addressed investment banking services. It should take this opportunity to clarify that, in addition to recognizing that a limited partner may provide loan and surety services to the limited partnership, an otherwise insulated limited partner may also provide investment banking services and remain insulated.

Recognizing that, under the insulation criteria, investment banking services do not materially relate to a partnership's media activities accords with the objective of the attribution rules. In the Attribution Order, the Commission stated:

> Our objective . . . is to establish a benchmark which avoids unnecessary and possibly costly regulatory intervention by minimizing the attribution of noninfluential interests, yet which also identifies with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees.

In the Matter of Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in

Broadcast, Cable Television and Newspaper Entities, Report and Order, 97 F.C.C.2d at 997, 1005 (1984) ("Attribution Order") (emphasis added).

Applying these first principles, no realistic potential exists that an investment banking firm will, in the course of providing investment banking services to a media limited partnership, affect the partnership's programming decisions. On the other hand, the cost of attributing ownership to the noninfluential interests of an investment banking firm limited partner could be great.

Also in the Attribution Order, the Commission explained its rationale for not attributing the interests of media business debt holders, as follows:

> There is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee.

Attribution Order, 97 F.C.C.2d at 1022.*

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* In the Attribution Reconsideration Order, the Commission went further and expressly allowed limited partners in media partnerships to lend capital to their limited partnerships without triggering attribution. In the Matter of Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 58 Rad. Reg. 2d (P&F) 604, 620 (1985). In subsequent decisions, the Commission affirmed its ruling. In re Richardson Broadcasting Group, 7 F.C.C.R. 1583, 1587 (1992); In re Magdalene Gunden Partnership, 6 F.C.C.R. 5976 (1991), aff'd, Marin TV Services Partners, Ltd. v. F.C.C., 993 F.2d 261 (D.C. Cir. 1993); In re McMurray, 8 F.C.C.R. 3168, 3173 (1993).

Using the same analysis, the Commission should find that investment banking services also do not trigger attribution. Investment banking services do not materially relate to the media activities of a partnership, because rendering such services does not place the investment bank in a position of influence and control and, thereby, directly intrude on the management or operation of the partnership. There is no nexus between investment banking services and the day-to-day operation or programming of a media property. Likewise, any indirect influence or control would be too irregular and involve too many factors for the FCC to oversee.

Nonattribution is Critical to Preserve an Important Source of Financing

Investment banking firms provide services critical to the efforts of media companies to raise capital. Media companies would be unnecessarily limited in their sources of financing were the FCC to decide that ownership attribution flows from the investment banking services provided by an otherwise insulated limited partner to its media limited partnership. The Commission has recognized that this is an important consideration in fashioning and interpreting its attribution rules.*

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* See Attribution Order, 97 F.C.C.2d at 1022-23 (1984), discussing the FCC's decision not to attribute debt and lease-back agreements ("Some sources of financing must obviously be available to broadcasters, and these sources seem by far the least likely to involve an (continued...)

Discouraging Capital Formation

The Commission's record already evidences that an investment banking firm can provide capital for media companies to enable them to enter the broadcasting industry and to expand and improve their service to the public. See Broadcast Attribution NPRM n. 132. Media companies, especially new, small and minority and women-owned entities, need to have available to them the option of obtaining financing through investment banks that take stakes in the form of limited partnership and other equity interests.

The consequence of ascribing an attributable interest to an investment bank providing investment banking services to a media limited partnership would be to discourage such financing. The record (see Broadcast Attribution NPRM n. 132) describes the experience of an investment fund of an investment banking firm that wished to take an equity interest in a media company. Because the fund held a nonattributable, minority, noncontrolling interest in another media company operating in the same local market, it was required to submit to a cross-interest policy analysis in Metropolitan Broadcasting Corp.,

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*(...continued)
interest with which the multiple ownership rules need be concerned.") and discussing the FCC's decision not to attribute the interests of properly insulated limited partners ("[T]he involvement of limited partners in certain enterprises provides another important source of capital for the industry, without inherently affecting the distribution or concentration of control within the industry.").

1 F.C.C.R. 1022 (1986). Although the Commission ultimately concluded that the fund's holding did not violate its cross-interest policy, the investment banking firm found the costs of this process, both monetarily and in terms of time, were significant. Ascribing attribution to investment banking services would, in the same way, raise the costs and increase the risks to investment banks, thus, deterring this source of financing to media companies.

Investment Banks Provide Two Sources of Financing

Investment banks provide two invaluable sources of financing to media enterprises. First, they arrange financing through the public offering or private placement of debt and equity securities. They also invest proprietary funds or funds from accounts over which they have the discretion to invest in media enterprises. Attributing ownership to their investments would add another regulatory layer to their investing and investment banking operations, discouraging them from providing these sources of financing to media enterprises. No policy reason exists to require that investment banks make a choice between investing and providing investment banking services to media companies.*

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* The FCC should be especially wary of further constricting equity funding for media properties from financial institutions. Federal banking laws already restrict the amount of equity federally regulated commercial banks and bank holding companies can hold in nonbanking concerns. These statutes makes it difficult for commercial banks and their affiliates to participate as equity investors in media companies. As (continued...)

In fact, a policy reason for not attributing an investment bank's investment is to avoid limiting financing sources available to media enterprises.

NONATTRIBUTION OF NONVOTING STOCK

Goldman Sachs urges the FCC to maintain the rule that nonvoting stock interests are not attributable, because they carry no risk of influence or control. Were the Commission to attribute such interests, it would restrict the flow of investment capital to media companies. The Commission itself has recognized the vital importance of facilitating providers of financing in taking nonvoting equity interests in media companies, stating that it:

> [A]ppears to be an invaluable means by which existing and prospective licensees raise new capital without diluting their control over their companies. It can also contribute significantly to relieving the dilemma faced by venture capital companies. Through nonvoting stock, these companies can obtain the equity deemed necessary to compensate their risk, while avoiding any implication of the control prohibited by our rules and other federal regulation. Such vehicles are thus particularly significant in promoting the diversity

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*(...continued)
a general matter, FDIC-insured national and state banks are not authorized to make equity investments in media concerns such as cable systems, television stations or radio stations. 12 U.S.C. §§ 24, 1831(a)(c) (West Supp. 1994). Bank holding companies are generally prohibited from owing more than five percent of the voting stock of such media concerns and more than 25 percent of the equity of such media concerns. 12 U.S.C. § 1843 (1989); 12 C.F.R. § 225.21 (1995).

> of ownership at which the multiple ownership rules are directed.

Attribution Order, 97 F.C.C. 2d at 1020-21 (emphasis added).

Given this invaluable capital source, the burden of proof should be on those who urge attribution of the nonvoting shares of shareholders. (See Broadcast Attribution NPRM ¶ 53) Without proof, the Commission should not assume that a significant nonvoting shareholder influences the operations of a media company.

CROSS-INTEREST POLICY ELIMINATION

The FCC should eliminate its cross-interest policy for nonattributable equity interests. The policy is vague and uncertain and no longer serves its purpose.

The Policy is Uncertain

The Commission's cross-interest policy is, by nature, vague. As stated in the Broadcast Attribution NPRM at ¶ 79, the policy evolved "almost entirely through case-by-case adjudication" and "required an *ad hoc* determination regarding the nonattributable interests at issue in each case."

In deciding to end application of its cross-interest policy to consulting positions, brokerage arrangements, and advertising agency representative relationships, the FCC recognized the policy had created a "burden and uncertainty" which could no longer be justified. Broadcast Attribution NPRM ¶ 80. The same analysis is applicable to nonattributable equity interests.

The problem with the cross-interest policy is compounded by the unintended adverse impact on other Commission policies to promote diversity of media ownership, particularly by racial minorities and women. The uncertainty engendered by the policy discourages investment in the broadcast industry and, thus, limits an important source of noncontrolling equity investment for these new entrants. Indeed, in a related notice of proposed rule making issued contemporaneously with the Broadcast Attribution NPRM, the FCC requests comment on whether it should modify and adopt new initiatives to increase minority and female ownership of mass media facilities, proposing for comment a relaxation of the attribution rules. <u>In the Matter of Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rule Making</u>, MM Dockets Nos. 94-149 and 91-140, FCC 94-323 (released January 12, 1995).

<u>The Policy No Longer Serves Its Purpose</u>

The costs of the cross-interest policy in terms of its burden of compliance and the uncertainty it creates no longer justifies whatever benefits it may confer. This is especially true when considered in light of the multiple ownership regulations it serves. Both the Commission and Congress are seriously considering proposals to either abolish or substantially modify these ownership restrictions. Given the tenuous nature of the ownership restrictions themselves, the FCC should not continue to extend their reach indefinitely through the cross-interest policy.

Cross-interest is a relic of the 1940s, a by-gone era when the attribution rules did not capture all the relationships that are now addressed under the cross-ownership rules. Nor is it consistent with today's technology and plethora of media voices. The Commission should end the cross-interest policy relating to nonattributable equity interests.

CONCLUSION

For the foregoing reasons, the FCC should clarify that an insulated limited partner providing investment banking services to the media limited partnership in which it has an investment is not providing services materially related to the partnership's media activities. Such a determination would contribute to the Commission's goal of promoting diversity by availing media limited partnerships of the opportunity to obtain the financing and other transaction-specific services of investment banking firms that are critical to the survival of new media businesses. Finally, the FCC should maintain its current nonattribution of nonvoting stock and should abolish its cross-interest policy, at least as to nonattributable equity investments.

Respectfully submitted,

THE GOLDMAN SACHS GROUP, L.P.

By: Patricia Diaz Dennis
Patricia Diaz Dennis, Esq.

SULLIVAN & CROMWELL
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 956-7500

Attorneys for The Goldman Sachs Group, L.P.

Dated: May 17, 1995